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In the Supreme Court of the United States

No. 78-1227

ELLIS NATIONAL BANK OF TALLAHASSEE,
Petitioner,

vs.

PERRY L. DAVIS and BURMA L. DAVIS, his wife,
Respondents.

ON PETITION FOR CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTORY STATEMENT

For the convenience of the Court and in the interest of brevity, the Respondents, Perry L. Davis and Burma L. Davis, his wife, will be referred to jointly in this Brief as Davis. The Petitioner, Ellis National Bank of Tallahassee, a National Banking corporation, will be referred to in this Brief as the Bank.

JURISDICTIONAL GROUNDS FOR PETITION FOR CERTIORARI

It is elementary that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The only case which has been found which would possibly lead to a construction of 12 U.S.C., §86 different from that set forth in the Florida First District Court of Appeal in the case sub judice is *Cronkleton* v. *Hall*, 66 F.2d 384 (8th Cir. 1933). Rule 19 of the Supreme Court Rules indicates the character of reasons which the Court considers as follows:

> Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

Respondents assert that *Cronkleton* is not in accord with past decisions of this Court, such as *First National Bank of Lake Benton* v. *Watt*, 184 U.S. 151, 22 S.Ct. 457, 46 L.Ed. 475 (1902) and its progeny.

Though the Supreme Court has never decided the specific issue which Petitioner raises, Respondents submit that the statute is clear when considered in conjunction with the purpose of the statute, as discussed *infra*, and that the decision of the Florida First District Court of Appeal in this case is in accord with the reasoning of all the opinions rendered by this Court, including *First National Bank of Lake Benton* v. *Watt*, *supra*, and its progeny.

Thus, Respondents respectfully submit that Petitioner has failed to show any special or important reasons justifying the invocation of this Court's review on certiorari.

QUESTION PRESENTED FOR REVIEW

The question presented for review by the Court is the interpretation of the penalty provision of Title 12, U.S.C., Section 86. The District Court of Appeal of Florida, First District, held that the Statute requires a bank that has stipulated that it knowingly employed a manner of computation which it knew would produce more interest than the maximum legal rate to pay as a penalty twice the amount of usurious interest paid.

ARGUMENT

The basic issue set forth by Petitioner in the Petition for Certiorari is the extent of the penalty due a debtor when a national bank has violated 12 U.S.C., Section 86 of the National Bank Act by charging usurious interest. Respondents assert that the statutory language, when considered in conjunction with the purpose of the legislation, is so unambiguous that the Petition for Certiorari is not logically supportable and, thus, the Petition for Certiorari should be denied.

12 U.S.C., Section 85 incorporates the lawful rate of interest of the state where the national bank is located. In the case at bar, the state trial court found the loan to be usurious. (See Petition for Certiorari, pages A-1 through A-5). The Florida First District Court of Appeal affirmed. (See Petition for Certiorari, pages A-6-A-18). The Supreme Court of Florida denied certiorari. (See Petition for Certiorari, page A-19). Judge Boyer of the

Florida First District Court of Appeal in denying the Petition for Rehearing in that court stated:

> Sub judice, on the other hand, the bank *stipulated* that it knowingly employed a manner of computation which it *knew* would produce more interest than the maximum legal rate. (Emphasis by the court).

(See Petition for Certiorari, pages A-18, A-4). This was flagrant usury in violation of the National Bank Act. When the petitioner admitted that it knowingly charged interest at an illegal rate, it subjected itself to the penalty provisions of 12 U.S.C., Section 86 which clearly state that the entire interest on a usurious loan shall be forfeited and, if interest has been paid the debtor is entitled to recover back twice the amount of the interest thus paid.

Petitioner claims that the statute means twice the interest paid on individual payments in which interest at an unlawful rate was charged. Such a construction is *clearly* contrary to the intent of the statute. *See generally, First National Bank of Lake Benton* v. *Watt,* 184 U.S. 151, 22 S.Ct. 457, 46 L.Ed. 475 (1902) (the proper penalty is twice the amount of the entire interest illegally exacted). Arguments have been made in the past that interest payments for purposes of the penalty provisions should be divided between legal and illegal interest payments. For example, if a 10% rate was lawful and an 11% rate was charged, the argument was that the penalty under 12 U.S.C, Section 86 was twice the illegal interest paid, i.e., twice the one percent difference between 10% and 11%. Such an argument was put to rest by this Court in *First National Bank of Lake Benton* v. *Watt, supra.* In the example it is not reasonable to consider the 10% legal and the 1% illegal, inasmuch as the entire interest exacted is illegal and usurious. Similarly, the "legal interest versus illegal interest" distinction is not reasonable

with respect to individual payments. If interest was charged at an unlawful rate then the interest on the loan is usurious and the entire loan is thereafter tainted with usury. The debtor may recover from the national bank twice the amount of interest thus paid. The same rationale applies to a loan made at a lawful rate but in which the creditor requires the debtor to pay certain charges which effectively push the rate into the unlawful category. The creditor would be subject to a penalty of twice the amount of interest paid, not twice the amount of the required charges which pushed the effective rate over the lawful rate. *See generally, e.g., Panos* v. *Smith,* 116 F.2d 445 (6th Cir. 1940). Such arguments are cognizable as attempts to evade the clear intent of the statute.

The first sentence of 12 U.S.C., Section 86 is unambiguous:

> The taking, using, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon.

That first sentence requires a forfeiture of the *entire* interest on the *entire loan* on which one takes or receives a usurious rate of interest. In the case at bar, the parties have stipulated and the court has adjudicated that a usurious rate was taken and received. If the second sentence is construed to provide anything other than a double recovery of the interest paid, then the statute would be inconsistent. While the creditor must forfeit the entire interest the debtor would only recover twice the amount of interest paid on individual payments which were calculated at an unlawful rate, with the result that the debtor could not recover interest which the creditor had forfeited.

Such a result is unreasonable and contrary to the intent of the statute.

It was obviously the purpose of the statute to prevent national banks from exacting excessive and illegal interest. The penalty imposed is for the purpose of preventing violations of the law, and consists of a sum of twice the amount of interest paid. The penalty was doubtless intended by Congress to reimburse the debtor for the cost and expenses of litigation and to discourage violations of the law by making it more profitable for banks to obey the law than to violate it. When considering the purposes of the statute, the provisions of 12 U.S.C., Section 86 are absolutely free from ambiguity.

With regard to petitioner's "Supplement to Petition for Certiorari" the law in Florida is clear that, generally, the question of usury in a contract is to be determined by the law in force when the contract is executed. *Holland* v. *Gross*, 81 Fla. 644, 89 So.2d 255 (1956); 33 *Fla.Jur.*, Usury, Section 7. Thus, even if it were true that the substantive law of the State of Florida has changed, Petitioner's argument that the loan is no longer usurious is of no avail.

However, the substantive law of the State of Florida has not changed and 12 U.S.C., Section 85 is basically the same statute that has been in effect for more than a century. The bottom line in the instant case is that petitioner has waived its argument that it falls within an exception to the usury statute by failing to assert it as an affirmative defense.

With regard to affirmative defenses, *Trawick's Florida Practice and Procedure* (1978), Section 11-4, states:

> In addition to the responses in an answer, the pleader must assert any affirmative defenses that he has to each cause of action alleged in the preceding pleading. An affirmative defense is one that wholly or partly avoids the cause of action asserted by the preceding pleading by new allegations that admit part or all of the cause of action, but avoids liability because of a legally sufficient excuse, justification or other matter negating the alleged breach or wrong.

See Florida Rules of Civil Procedure 1.100(d), 1.140(b). The law in Florida is clear that an affirmative defense that is not pleaded is waived. *Fink* v. *Powsner*, 108 So.2d 324 (Fla. 3d D.C.A. 1959); *Trawick's Florida Practice and Procedure* (1978), Section 11-4 at page 175.

It is obvious that Petitioner's assertion that the loan falls within some exception to the Florida usury statute is an affirmative defense to Davis' counterclaim for usury. If applicable, such a defense would avoid the bank's liability inasmuch as the defense would constitute a legally sufficient excuse or justification for charging the excessive interest rate. At this late date, however, petitioner attempts to argue the affirmative defense in a supplement to its Petition for Certiorari. It *failed to assert* the statute, 12 U.S.C., Section 85, at the trial court level, at the appellate level, in its Petition for Certiorari to the Supreme Court of Florida, in its Petition for Certiorari to this Court, but now asserts it in its Supplement to Petition for Certiorari. It is clear that Petitioner waived its affirmative defense when it failed to plead it at the state trial-court level.

Nevertheless, Petitioner asserts that it is exonerated by *Cesary* v. *The Second National Bank of North Miami*, (Supplement to Petition for Certiorari, pages SA-20 through 24). Such logic is difficult to perceive. In *Cesary*, the defendant *specifically asserted* its affirmative defenses in its answer to the plaintiff's complaint and *alleged the*

requisite facts and elements to place the loan within an exception to the Florida usury statute. (See Supplement to Petition for Certiorari, page SA-10). *The record is in this case totally void of any factual allegations which would place the loan involved in this case within any exception to the usury statute.*

Furthermore, petitioner claims that *Cesary, supra,* coupled with *Cesary* v. *The Second National Bank of North Miami,* ..... So.2d ..... (Fla. 1979) (Supplement to Petition for Certiorari, pages SA-27 through 36) drastically changed the underlying substantive law of the State of Florida. (See Supplement to Petition for Certiorari, page SA-6). This analysis is puzzling. The Florida Supreme Court on February 1, 1979, merely said that the exceptions to the Florida usury statute were not unconstitutional under the Florida Constitution. The decision of the United States District Court for the Southern District of Florida was rendered on December 22, 1975, and was based on its findings that under the provisions of the National Bank Act, the bank in that case could charge interest at rates permitted by Florida law to any state chartered or licensed lending institution, pursuant to such statutes. The affirmative defense in that case, however, was not a novel theory. The District Court, on October 22, 1975 (Supplement to Petition for Certiorari, page SA-16) stated:

> (b) The United States Comptroller of the Currency has by Interpretive Ruling 7.7310 stated that a national bank may charge interest at the maximum rate permitted by state law to any competing state chartered or licensed lending institution. This ruling has been followed by the courts. *Northway Lanes* v. *Hackley Union National Bank and Trust Company,* 334 F.Supp. 723 (1971), affirmed 464 F.2d 855 (3d Cir. 1972); and *Commissioner of Small Loans* v. *First National Bank,* 300 A.2d 685 (Court of Appeals, Maryland, March 1, 1973).

See, e.g., Hiatt v. *San Francisco National Bank,* 361 F.2d 504 (9th Cir. 1966), cert. den. 87 S.Ct. 323, 385 U.S. 948, 17 L.Ed.2d 227, rehearing den. 87 S.Ct. 702, 385 U.S. 1021, 17 L.Ed.2d 560; *First National Bank in Mena* v. *Nowlin,* 374 F.Supp. 1037 (E.D. Ark. 1974), affirmed 509 F.2d 872 (8th Cir. 1975).

Concisely stated, the petitioner chose neither to assert the affirmative defense nor to allege the requisite factual elements with regard to any exception to the usury statute. It is barred from doing so now.

Respondents submit that the statutory language when considered in conjunction with the purpose of the legislation, is so unambiguous that the Petition for Certiorari is not logically supportable and, thus, the Petition for Certiorari should be denied.

CONCLUSION

For the reasons stated above, Respondents respectfully submit that the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, CHARLES J. FRANSON, attorney for Perry L. Davis and Burma L. Davis, his wife, Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of March, 1979, I served copies of the foregoing Brief in Opposition to Petition for Certiorari on the several parties thereto as follows:

On Ellis National Bank of Tallahassee, a National Banking corporation, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record as follows:

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